Department of Labor and Industry
Board of Personnel Appeals
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STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF THE UNFAIR LABOR PRACTICE CHARGE NO. 7-2009

SUSAN L. ASHLEY, Complainant, -vs- HARLOWTON EDUCATION ASSOCIATION, MEA-MFT and SCOTT MCCULLOCH, MEA-MFT FIELD CONSULTANT, Defendants.	INVESTIGATIVE REPORT AND NOTICE OF INTENT TO DISMISS

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THIS IS A DRAFT ONLY – CONTAINS OTHER DECISION LANGUAGE – ULTIMATELY THE CASE WAS WITHDRAWN AND DISMISSED

I. Introduction

On October 2, 2008, Susan L. Ashley, filed an unfair labor practice charge with the Board of Personnel Appeals alleging a violation of 39-31-402(1) MCA. The complainant named Scot (sic) McCulloch, affiliated with the Montana Education Association-Montana Federation of Teachers, hereafter MEA-MFT,as the defendant,. Ms. Ashley is appearing *pro se* and contends she was not fairly represented by MEA-MFT and Mr. McCulloch. The complaint was served upon Eric Feaver, MEA-MFT President. Richard Larson, Attorney at Law, responded on behalf of the defendants, including the Harlowton Education Association. On behalf of the defendants Mr. Larson denied any violation of Montana law.

John Andrew was assigned to investigate the charge, has reviewed the submissions of the parties and has communicated with the parties in the course of investigating the charge.

II. FINDINGS AND DISCUSSION

The Board of Personnel Appeals has jurisdiction over this matter. The Montana Supreme Court has approved the practice of the Board of Personnel Appeals in using Federal Court and National Labor Relations Board (NLRB) precedent as guidelines in interpreting the Montana Collective Bargaining for Public Employees Act, State ex rel. Board of Personnel Appeals vs. District Court, 183 Montana 223 598 P.2d 1117, 103 LRRM 2297; Teamsters Local No. 45 vs. State ex rel. Board of Personnel Appeals, 185 Montana 272, 635 P.2d 185, 119 LRRM 2682; and AFSCME Local No. 2390 vs. City of Billings, Montana 555 P.2d 507, 93 LRRM 2753. To the extent cited in this decision, federal precedent is considered applicable.

Before addressing the facts of this case the captioning of this matter must first be addressed. The collective bargaining agreement that Ms. Ashley contends was violated is between the Harlowton Education Association, hereafter HEA, and Harlowton School District 16, hereafter HSD. The HEA is affiliated with the MEA-MFT. Mr. McCulloch is a consultant with MEA-MFT and upon request provides services to the HEA affiliate. In discussing this matter with Mr. Larson and Ms. Ashley, both are satisfied that as reflected in this report the correct defendants be named as the HEA and Mr. McCulloch.

The root of this unfair labor practice complaint is found in Ms. Ashley's allegations that a complaint letter was kept by the Administration without notice to her or an opportunity for rebuttal and also that the school board did not review its evaluations prior to its decision to nonrenew her contract. In both of these allegations Ms. Ashley alleges that the HSD and Mr. McCulloch failed to fairly represent her.

Susan Ashley was first employed by the HSD for the 05/06 school year. She was consecutively employed in school years 06/07 and 07/08. Ms. Ashley had not reached tenure as defined in 20-4-203 MCA – a teacher "elected by the offer and acceptance of a contract for the fourth consecutive year of employment by a district in a position requiring teacher certification . . ." In May of 2008 Ms. Ashley was timely notified of her nonrenewal by the HSD. HSD followed the provisions of 20-4-206 in notifying Ms. Ashley of her nonrenewal. The relevant provisions of that statute provide:

20-4-206. Notification of nontenure teacher reelection -- acceptance -- termination.
(1) The trustees shall provide written notice by June 1 to each nontenure teacher employed by the district regarding whether the nontenure teacher has been reelected for the ensuing school fiscal year.
(3) Subject to the June 1 notice requirements in this section, the trustees may nonrenew the employment of a nontenure teacher at the conclusion of the school fiscal year with or without cause.

For the term of her employment with HSD Ms. Ashley was subject to HSD School Board policy. She was also subject to a collective bargaining agreement, CBA, between the HEA and HSD. That contract contained a grievance procedure as well as final and binding arbitration. Relevant portions of the contract, Article 2.1 and Article 2.2 provide for an evaluation process for teachers and an opportunity for a teacher to rebut

> "Any complaints regarding a teacher made to any member of the Administration by any parent, student, or other person which may be used in any manner in evaluating a teacher".

The contract further requires that any such complaints be called to the attention of the teacher in a timely manner, fairly investigated, and opportunity for the teacher to be represented by the HEA.

Article 3, EMPLOYMENT STATUS OF NON-TENURED TEACHERS of the CBA specifically provides:

> "The employment status of non-tenured teachers will be handled in accordance with applicable Montana statutes."

The above noted, it is not the role of the investigator to determine whether or not there is merit to the grievance of Bill Spannring. Rather, as set down by the U.S. Supreme Court in Vaca v Sipes 386 U.S. 171, 64 LRRM 2369 (1967) and as subsequently followed by the Board of Personnel Appeals in Ford v University of Montana, 183 Mont. 112, 598 P.2d 604 (1979) the role of the Board in an alleged breach of the duty of fair representation is to determine whether the actions of a union, or lack of action, in some way are a product of bad faith, discrimination or arbitrariness.

Some discussion of the nature of reason for the demotion is necessary in order to provide the framework for the actions taken by Local 630.

When an employee claims that a union breached its duty of fair representation by failing to grieve his complaints, courts typically look to determine whether the union's conduct was arbitrary. Clarke v. Commc'ns Workers of America, 318 F.Supp.2d 48, 56 (E.D.N.Y. 2004). A union acts arbitrarily when it "ignores or perfunctorily presses a meritorious claim," Samuels v. Air Transport Local 504, 992 F.2d 12, 16 [143 LRRM 2177] (2d Cir. 1993), but not where it "fails to process a meritless grievance, engages in mere negligent conduct, or fails to process a grievance due to error in evaluating the merits of the grievance," Cruz v. Local Union No. 3 of the Int'l Bhd. of Elec. Workers, 34 F.3d 1148, 1154-55 [147 LRRM 2176] (2d Cir. 1994). As part of determining whether a grievance lacks merit the union must "conduct at least a 'minimal investigation' … [b]ut only an 'egregious disregard for union members' rights constitutes a breach of the union's duty' to investigate." Emmanuel v. Int'l Bhd. of Teamsters, Local Union No. 25, 426 F.3d 416, 420 [178 LRRM 2261] (1st Cir. 2005) (quoting Garcia v. Zenith Elec. Corp., 58 F.3d 1171, 1176 [149 LRRM 2740] (7th Cir. 1995); Castelli v. Douglas Aircraft Co., 752 F.2d 1480, 1483 [118 LRRM 2717] (9th Cir. 1985)).

Did Local 630 conduct "at least a minimal investigation" or did it act arbitrarily or in bad faith when it decided to not take the demotion grievance to arbitration? In deciding this question Bill Spannring first points to a grievance guide he contends was not followed by the Local. The guide in question is one prepared by the International Association of

Fire Fighters as a recommended process. This guide is just that, a guide indicating how grievances might be handled. It is a guide that probably has far more meaning in, for instance, Chicago or New York where locals are far larger and communication can be a problem because of the volume of grievances and the number of employees. The guide is not all controlling and strict adherence to the grievance guide by Local 630 was neither a denial of due process, nor does it demonstrate bad faith or arbitrariness.

In terms of the actual investigation, with 13 or so members in the Local 630 bargaining unit much of what happens in the work place is known by everyone. Communication with the employer occurred between management and the bargaining unit and the grievance committee had a good understanding of the charges made by the City as well as the actions of Captain Spannring. This was not a case where a grievant was blind sided either by the City, the Local, or the two acting in concert. Past practice was not an issue, nor was the absence of regular evaluations. This was an example of serious events, of recent origin, that were troubling to management as well as bargaining unit members. Traditional progressive discipline was not ignored, but rather was fast tracked given the serious nature of the situation. Things were out on the table and seemingly known to all. Perhaps nowhere is this more evidenced than in the completeness of the documentation retained by Captain Spannring and presented to the investigator. Based on this documentation as well as in conversations with Mr. Spannring and others in the Local, it is apparent to the investigator that by and large everyone knows, or is aware of what is happening in the workplace. The charges against Captain Spannring were well known and well understood. From what the investigator was able to determine Mr. Spannring was apprised not only of his rights throughout these disciplinary actions, but he was fully aware of the nature of allegations made, where the allegations came from, and his right to respond to the allegations. This is not a case where due process was not afforded by the City, nor is it a case where the Local failed to offer its services to Mr. Spannring. Given the base of knowledge it possessed the fact that Captain Spannring was not interviewed by the grievance committee does not mean that the investigation conducted by the committee was deficient in some way. The investigation was adequate given the circumstances and the decision to not arbitrate the grievance is a supportable decision on the part of the Local.

In addressing the question of why the Local elected to not take the demotion grievance to arbitration two U.S. Supreme Court decisions are helpful in analyzing the duty of fair representation. In Vaca v. Sipes, supra, the Court allowed a union a wide range of discretion in processing grievances, all subject to a requirement that the union act in good faith. The Court in language contained in Hines v. Anchor Freight Motors, 424 U.S. 554, stated that "the burden of demonstrating breach of duty by the Union . . . involves more than demonstrating mere errors in judgment . . .". In a Ninth Circuit case, Price v. Southern Pacific Transportation Company, 586 F2d. 550 (1978), again addressing the processing of grievances the court stated:

> "The record provides no showing of ill will, prejudice, or deliberate bad faith on the part of the Union . . . Nor does it show unintentional conduct "so egregious,

so far short of minimum standards of fairness to the employee and so unrelated to legitimate union interests to be arbitrary".

Here Local 630 appointed a grievance committee to determine the merits of the grievances. As previously mentioned the committee recommended that one grievance proceed to arbitration. In and of itself this demonstrates that a grievance filed by Bill Spannring would not be dismissed out of hand or through some arbitrary process. Rather, in the case of the demotion the Local was faced with substantial evidence supporting the action taken by the City. In addition, the actions of the City seemed to be well taken and supported by members of the Local. Even when his case was essentially taken to the body, the rank and file rejected the option to arbitrate. Given the competing interests of an individual with those of the body, the individual did not prevail, see for instance, ULP 15-87, Mary Pahut v. Butte School District and Butte Teachers Unoin, Local No. 332 , but the reason he did not prevail was founded neither in bad faith nor arbitrary action. Whether he recognized it or not, Captain Spannring did not enjoy the support of either the City or the vast majority of his fellow workers. His position in a leadership position was eroded by his actions and was particularly problematic to both the City and to the members of Local 630.

Since discrimination is a key element considered by both the federal and Montana courts that allegation needs to be addressed in addition to the elements of bad faith and arbitrariness. Bill Spannring did file a charge of discrimination with the Montana human rights bureau. The human rights investigator assigned to that case issued a final investigative report on June 10, 2008. The Board of Personnel Appeals investigator received a copy of the report on June 27, 2008, and takes notice of its content. The report did not find reasonable cause to the charge of Mr. Spannring that he was discriminated against because of a disability/perceived disability. The findings of the human rights investigator were that "throughout the entire investigatory process by the grievance committee, Spannring was not forthcoming with the information and refused any and all assistance from Local 630 prior to actually filing the grievances". This finding is consistent with the evidence reviewed by this Board of Personnel Appeals investigator. And, although Mr. Spannring was certainly accommodating and forthcoming with the Board investigator his reticence to cooperate with the Local did not help his cause. However, there was no demonstrated link between the medical condition of Mr. Spannring and the actions taken by Local 630. To be sure, there were what could be termed generational style differences and/or work place differences between Mr. Spannring and some of the other members of Local 630 but they did not rise to the level of discrimination either on the basis of age or disability. There simply is insufficient evidence to find that either type of discrimination occurred.

III. Recommended Order

It is recommended that unfair labor practice charge 14-2008 be dismissed.

DATED this 1st day of July 2008.

BOARD OF PERSONNEL APPEALS

By: _____
John Andrew
Investigator

NOTICE

Pursuant to 39-31-405 (2) MCA, if a finding of no probable merit is made by an agent of the Board a Notice of Intent to Dismiss is to be issued. The Notice of Intent to Dismiss may be appealed to the Board. The appeal must be in writing and must be made within 10 days of receipt of the Notice of Intent to Dismiss. The appeal is to be filed with the Board at P.O. Box 6518, Helena, MT 59604-6518. If an appeal is not filed the decision to dismiss becomes a final order of the Board.

CERTIFICATE OF MAILING

I, _____ , do hereby certify that a true and correct copy of this document was mailed to the following on the _____ day of July 2008 postage paid and addressed as follows:

BILL SPANNRING
323 S 8TH
LIVINGSTON MT 59047

PRESIDENT MIKE CHAMBERS
IAFF LOCAL 630
113 S K STREET
LIVINGSTON MT 59047